

Serial: 212468

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99002-SCT

IN RE: MISSISSIPPI RULES OF EVIDENCE

EN BANC ORDER

On December 15, 2016, by unanimous order of the Court, the Mississippi Rules of Criminal Procedure were adopted. The Court's *en banc* order provided that this new body of rules take effect July 1, 2017, and adjudicated that the Mississippi Rules of Criminal Procedure “. . . shall govern the procedure in all criminal proceedings in the Circuit, County, Justice and Municipal Courts of this State.”

Inasmuch as said Mississippi Rules of Criminal Procedure have the effect of altering, duplicating, supplementing and/or replacing certain of the existing provisions of Mississippi's Rules of Evidence, the Court finds and adjudicates that said Rules of Evidence should be, and they hereby are, amended in accordance with Exhibit A, which by reference is incorporated in and made a part of this order. Such amendments shall take effect on July 1, 2017.

The Clerk of this Court shall spread this order and the amended rules attached hereto on the minutes of the Court, and the Clerk shall provide a certified copy thereof to West Publishing Company for publication in a forthcoming edition of the Southern Reporter, Mississippi Cases, which is the official publication of the decisions of this Court, and in the next edition of the Mississippi Rules of Court.

SO ORDERED, this the 15th day of May, 2017.

/s/ James W. Kitchens

JAMES W. KITCHENS, JUSTICE
FOR THE COURT

ALL JUSTICES AGREE.

EXHIBIT A

MISSISSIPPI RULES OF EVIDENCE

Rule 410. Pleas, Plea Discussions, and Related Statements

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Advisory Committee Note

The language of Rule 410 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, adding subdivisions. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Under existing Mississippi law, a plea of *nolo contendere* by a defendant is not admissible against him later in either a civil case or a criminal case. *See Keys v. State*, 312 So. 2d 7 (Miss. 1975). (A plea of *nolo contendere* is only available in misdemeanor cases). Rule 410 is consistent with Mississippi law by rendering inadmissible both guilty pleas which are withdrawn and statements made in a judicial proceeding regarding a plea of guilty which is withdrawn or a plea of *nolo contendere*. *See Sanders v. State*, 435 So. 2d 1177 (Miss. 1983) and ~~Rule 3.03(6), Uniform Criminal Rules of Circuit Court Practice~~ [MRCrP 15.4](#).

The exceptions to this rule of inadmissibility are limited. The first exception covers situations in which the defendant testifies at trial that the prosecutor or police made a statement expressing doubt as to defendant's guilt. In such an instance, the state would be able to introduce the defendant's statement or plea to rebut his testimony.

[“Advisory Committee Note” substituted for “Comment,” effective June 16, 2016; amended July 1, 2016, to note restyling.]

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Rule 503. Privilege between Patient and Physician or Psychotherapist

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Advisory Committee Note

The language of Rule 503 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. In Rule 503(a)(4)(C), “diagnosis or treatment” replaces “diagnosis and treatment,” to conform to Mississippi law, including the statement of

privilege in subdivision (b). These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Subdivision (a) defines the terms “patient,” “physician,” “psychotherapist,” and “confidential communication.” Existing Mississippi law is codified at M.C.A. § 13-1-21. The existing statute is broader than Rule 503(a) in that it extends the privilege to physicians, osteopaths, dentists, hospitals, nurses, pharmacists, podiatrists, optometrists, and chiropractors. M.C.A. § 73-31-29 extends the privilege to psychologists. Additionally, under existing Mississippi law no allowance has been made for an erroneous belief that the treating individual was a physician. Rules 503(a)(2) and (3) make such an allowance.

Rule 503(a)(4) is essentially a codification of existing state practice. It is compatible with the definition of “confidential communication” under Rule 502 (the attorney-client privilege.)

Rule 503(b) is a statement of the privilege rule. It, too, is compatible with the statement of the attorney-client privilege in Rule 502. The public policy protecting communications made about alcohol and drug addiction arises out of the current contemporary concern about these problems. By protecting these communications it is hoped that rehabilitation efforts will be encouraged.

Subdivision (c) is reflective of M.C.A. § 13-1-21. The privilege belongs to the patient, and only the patient can waive it.

Subdivision (d) excepts four instances from the privilege. The first exception concerns commitment proceedings. Existing law in Mississippi is structured so that such communications currently are not privileged. *See* M.C.A. § 41-21-67 et seq.

The second exception under subdivision (d) pertains to court-ordered physical or mental examinations. The exception is necessary for the effective utilization of this procedure. It is important to note that the exception is effective only with respect to the particular purpose for which the examination is ordered. No statement made by an accused in the course of an examination into competency to stand trial is admissible on the issue of guilt. *See also* Rule 4.08, Uniform Criminal Rules of Circuit Court Practice MRCrP 12.4.

Under the third exception there is no privilege when a controversy develops between physician and patient, such as in a dispute over medical fees or medical malpractice.

Under subdivision (d)(4), when determining whether records are relevant to a custody, termination, or adoption action, some of the factors courts should consider include whether: (1) the treatment was recent enough to be relevant; (2) substantive independent evidence of serious impairment exists; (3) sufficient evidence is unavailable elsewhere; (4) court ordered evaluations are an inadequate substitute; and (5) given the severity of the alleged disorder, communications made in the course of treatment are likely to be relevant.

Subdivision (e) is required by considerations of fairness and policy, and simply provides that the institution of a claim, either by delivery of written notice or by the filing of an action, operates to waive the privilege as to any medical information relevant to the claim.

The primary impact of subdivision (f) will be in personal injury actions, although the exception by its terms is not so limited. This subdivision, like the remainder of these rules, has no application outside the context of hearing or discovery processes in the Mississippi Rules of Civil Procedure and other rules of court. *See* Rules 101 and 1101. By virtue of this exception a party who seeks recovery of damages for a physical, mental or emotional injury waives the privilege for purposes of that action only and to the extent that he or she has put his or her physical, mental or emotional condition in issue by his or her pleadings. With respect to any aspect of the party’s physical, mental or emotional condition not put in issue by his or her pleadings, the privilege remains in full force and effect. Rules of Evidence by their definition govern the admissibility of evidence at trial. Subdivision (f) is not a procedural rule and cannot be used as such.

[Amended effective May 27, 2004; “Advisory Committee Note” substituted for “Comment,” effective June 16, 2016; amended July 1, 2016, to note restyling.]

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Rule 614. Court’s Calling or Examining a Witness

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Advisory Committee Note

The language of Rule 614 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 614 is, in general, similar to Mississippi practice.

Subdivision (a) reflects the recognized authority of the trial judge to call witnesses. When the court calls its own witness, any party has the right to cross-examine that witness.

Subdivision (b) codifies the traditional authority, recognized in Mississippi and elsewhere, of the judge to interrogate the witness directly. The judge abuses this authority, however, when he abandons his judicial detachment and assumes an advocacy position. *See Jones v. State*, 223 Miss. 812, 79 So. 2d 273 (1955), appeal dismissed, *cert. denied*, 350 U.S. 869 [76 S. Ct. 116, 100 L. Ed. 770] (1955), rehearing denied, 350 U.S. 919 [76 S. Ct. 192, 100 L. Ed. 805 (1955)]; ~~Rule 5.08, Uniform Criminal Rules of Circuit Court Practice~~. The appellate court can in such cases reverse for abuse of discretion. *See Breland v. State*, 180 Miss. 830, 178 So. 817 (1938).

The case of *Griffin v. Tate*, 171 Miss. 70, 156 So. 652 (1934), established guidelines for judicial interrogation which may be helpful in setting the parameters of subdivision (b). *Griffin* mentions by way of illustration some instances in which judicial interrogation would be appropriate: when a nervous witness needs to be calmed or is reluctant to testify or is confused as well as when the witness has important information which has not been elicited from him.

Subdivision (c) is an attempt to relieve counsel from the embarrassing position of objecting in the jury's presence to the judge's interrogation. It allows, moreover, sufficient time for counsel to make the objections in time for corrective measures.

["Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended July 1, 2016, to note restyling.]